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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

FILE:

Office: VERMONT SERVICE CENTER

Date:

JUN 30 2004

IN RE:

Petitioner:

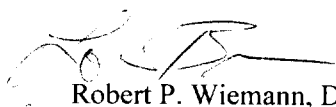
Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an industrial construction company. It seeks to employ the beneficiary permanently in the United States as a welder. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits additional evidence and asserts that the petitioner has employed the beneficiary at the proffered wage.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 20, 2001. The proffered wage as stated on the Form ETA 750 is \$16.58 per hour, which amounts to \$34,486.40 annually. Form 750 ETA-B, dated January 18, 2001, and signed by the beneficiary, states that the petitioner has employed the beneficiary since June 2000.

With the petition, the petitioner, through counsel, submitted a copy of the alien beneficiary's individual Form 1040, U.S. Individual Income Tax Return for 2000 and 2001. A Wage and Tax Statement (W-2), issued by the petitioner, showing \$32,311.81 in wages paid in 2001 (\$2,174.60 less than the proffered annual salary) accompanied the tax returns. The W-2 named "Victor Baraona," as the employee, which is not the beneficiary's name,¹ as set forth on either the individual tax returns or the Immigrant Petition for Alien Worker (I-140). The 2000 W-2 also shows "Victor Baraona as the employee. The petitioner offers no explanation for this discrepancy.

¹ Form G-325A, "Biographic Information," dated May 15, 2002 and signed by the beneficiary, asks the alien to list all other names used, including names by previous marriages. "None" is given as the answer.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on November 21, 2002, the director requested additional evidence pertinent to that ability as well as to the beneficiary's qualifying work experience. The director advised the petitioner to submit additional evidence establishing its continuing ability to pay the beneficiary's proposed wage offer of \$34,486.40 as of February 20, 2001, the visa priority date. The director also specifically requested that the petitioner to provide a copy of its 2001 federal tax return, as well as a copy of the beneficiary's W-2, if the petitioner employed the beneficiary in 2001.

In response, the petitioner submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for 2001. It reflects that the petitioner filed its 2001 taxes based on a fiscal year beginning on February 1, 2001 and ending on January 31, 2002. It shows that the petitioner declared net income of -\$5,047 before the net operating loss (NOL) deduction. Schedule L of the tax return reveals that the petitioner had \$298,779 in current assets and \$359,446 in current liabilities, producing -\$60,667 in net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² If a corporation's net income fails to reflect sufficient funds to pay the proffered wage, then CIS will review the corporation's net current assets as shown on Schedule L of its tax return. If its end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

CIS will also examine whether a petitioner has employed a beneficiary during the relevant period of time. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. If the petitioner has employed a beneficiary at less than the proffered wage, CIS will determine whether the difference between the proffered wage and beneficiary's salary can be paid out of either the petitioner's net income or its net current assets.

In addition to the petitioner's 2001 corporate tax return, counsel submitted a letter from the petitioner, dated January 31, 2003, discussing the beneficiary's welding skills. The letter also suggests that the petitioner continues to employ the beneficiary. Counsel submitted no further evidence of the wages paid to the beneficiary in response to the director's request for additional evidence.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on June 11, 2003, denied the petition.

On appeal, counsel asserts that the petitioner has employed the beneficiary since June 26, 2000 at the proffered wage, which establishes its continuing ability to pay the proposed wage offer. Counsel resubmits a copy of the petitioner's 2001 corporate tax return, along with copies of the petitioner's 1999 and 2000 tax returns. Counsel also submits a letter from the petitioner stating that its accountants have filed an application for an extension of

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

time to file the 2002 tax return. The 1999 and 2000 tax returns will not be considered, as the petitioner's 2001 tax return covers the priority date of February 20, 2001. Counsel also offers another copy of the beneficiary's 2001 individual tax return, as well as a copy of his 2002 individual tax return.

As mentioned above, CIS will review the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The evidence offered in support of counsel's proposition that the petitioner has employed the beneficiary at the proffered wage is not persuasive. A 2001 W-2 issued to an individual with a different name will not be considered as probative evidence of the amount of wages that the petitioner paid to the beneficiary during 2001. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As noted above, the petitioner offered no explanation of this discrepancy and offered no other convincing evidence establishing the amount of wages that it has paid the beneficiary. Additionally, the beneficiary's individual tax returns for 2000 and 2001 do not disclose the source of his wages and do not reflect that he has earned the proffered annual salary of \$34,486.40 from any source.³ Moreover, as shown by the petitioner's 2001 corporate income tax return, any shortfall resulting from a comparison of the beneficiary's purported 2001 wages and the proffered wage could not be paid out of either the petitioner's net income of -\$5,147 or its net current assets of -\$60,667.

The petitioner failed to submit sufficient persuasive evidence demonstrating that it had the continuing ability to pay the proffered wage as of February 20, 2001. Therefore, the petitioner has not established that the beneficiary is eligible for the visa classification at the time of filing pursuant to section 203(b)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii). See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

³The beneficiary's 2002 tax return shows that he reported \$30,182 in salaries or wages, which is \$4,304.40 less than the proffered salary.